IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [illegible]

No. 133

JOHN H. CHATZ, Trustee in Bankruptcy of Hoagland & Allum Co., Inc.,

Petitioner,

vs.

MIDCO OIL CORPORATION, a corporation,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR THE WRIT OF CERTIORARI.

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INTRODUCTION.

The suit in which the writ is prayed is an ordinary action to recover from respondent the value of shares of its capital stock which it purchased for its treasury from a recognized broker of the stock who subsequently became bankrupt, but which stock it is claimed was fraudulently secured from the bankrupt's customers. (Decision of District Court, R. 275; Opinion of C.C.A., R. 447).

The issue is whether the respondent is a purchaser for value, in good faith, and without notice of admittedly properly indorsed and guaranteed street certificates. Both courts below held that the respondent secured good title, the reviewing court (R. 451) concurring in the special findings of the trial court (R. 486). The controlling rules of law are definitely established, and were properly applied

by the trial and reviewing courts upon such concurred findings.

It is significant that in the presentation of the petition and supporting brief, the petitioner asserts twelve "Questions Presented" (Pet'n. 7-9); specifies nine items in "Specification of Errors" (Br. 12-13); suggests five "Reasons Relied On for The Allowance of the Writ" (Pet'n. 9-10); and has four points of "Argument" (Br. 13-24). The generalities of "Questions Presented" and of the "Specification of Errors", and the lack of relationship and consistency between them and between them and the "Reasons" and "Argument" urged for allowance, demonstrates that petitioner has no crystallized conception of his disagreement with the coinciding decisions and findings below. He merely complains.

Of the four points of Argument, Points I and II relate to an issue not pleaded, upon which no evidence was adduced, which the trial court was not asked to decide (Pltf's Submitted Findings, etc. R. 414, et seq.) and did not decide, and which issue was sought to be injected for the first time on appeal (R. 449), but without assignment of error (R. 432). Points III and IV of the Argument were properly decided below.

Even had the contentions raised in Points I to IV been decided as petitioner wishes, there would have been no difference in the result.

There is not presented any conflict of decisions, any question of general interest, nor any issue of special or unusual importance.

RESPONDENT'S STATEMENT OF THE MATTER INVOLVED.

Petitioner has a five page "Statement of the Matter Involved" (Pet'n. 2-7). Essentially all of page 2 and the entire page 3 is a summary of what "is charged in the

supplemental complaint". Half of page 4 is devoted to discussion of the answer.

Of the digest of the complaint and answer, respondent has no comment save that:

(1) The decisions below were based on special findings of fact (R. 426, et seq.) approved by the appellate court (R. 451) and not upon what "is charged in the supplemental complaint"; and

(2) It is revealed in petitioner's own summary that the charge that respondent's purchase was an act in excess of statutory authority, a point now principally relied upon, is conspicuously absent.

Such contention (see Points I and II of petitioner's argument) was not even urged in petitioner's assignment of errors to the appellate court (R. 432-4). Nor did petitioner seek any finding in the trial court on the now-attempted issue (R. 414-426). Obviously the District Court could have made no finding in respect to respondent's power to purchase, for no evidence was adduced on the point, or could have been adduced under the pleadings.

Petitioner states (Pet'n. 4), that the stock purchase was made "substantially in the manner as charged in the complaint." **Each of the lower tribunals held exactly to contrary**, as will be shown very shortly.

Of the intermediary, Lahman, in the purchase transaction two erroneous statements are made. His letter transmitting the purchase price (R. 386) and asking to be notified upon the arrival of the certificates is called "secret" (Pet'n. 4). It was no more secret than any other paper or record, either of the Fourth National Bank of Tulsa, or of The Northern Trust Company, all of which were produced. Again Lahman is referred to as "respondent's intermediary" (Pet'n. 5). Lahman was directed by Engel of the bankrupt to offer the stock for sale (R. 279, 448).

The Circuit Court of Appeals is charged with not reviewing the record (Pet'n. 6). That Court said it did examine the record (R. 451).

The observations, (Pet'n. 6) that consent of stockholders for the purchase was not secured and that respondent's capital was impaired, were not and are not in issue. No allegations are found in the complaint (R. 9-14) even suggesting, much less raising, such an issue. The trial was completely barren of any such point, as shown by the pleadings (R. 9-14, 30-35), the evidence, the decision (R. 274), the petitioner's proposed findings (R-414-422), the findings entered (R. 426), and appellant's statement of points on appeal (R. 432-434).

The "Questions Presented" (Pet'n. 7) and the "Specification of Errors" (Br. 12) do not utter a word challenging the findings of fact of the District Court (R. 426). This impartial, judicial statement is therefore referred to for a concise statement of the facts. From the findings it is clear that petitioner's statement that the stock was purchased "substantially in the manner as charged in the supplemental complaint" is most inaccurate. The Court, in brief, made the following numbered findings:

3. Hoagland and Allum was adjudicated bankrupt on or about April 14, 1938 (R. 426, 449).

4. On September 3, 1937, Hoagland and Allum, or its officers, Engel or Larsen, sold 2,000 shares of capital stock of Midco (respondent) to Midco. This stock, except 125 shares owned by Engel, belonged to customers who had deposited with Hoagland and Allum their respective certificates endorsed in blank with their signatures guaranteed. None of the proceeds of the sale ever came to the customers (R. 426-7, 448).

6. In April, 1937, Hoagland and Allum, with proxies, tried to oust from control of Midco, its president, Toomey.

There had been a bitter dispute over control of that corporation (R. 427).

7. In July, 1937, a stockholders' committee organized by Hoagland and Allum circularized Midco stockholders to deposit with the First National Bank of Tulsa, their certificates of stock "for offer of sale to Roy Mead at $43 a share in the event not less than 51% of the total outstanding stock of Midco be so deposited" (R. 427, 448).

8. After receiving a number of letters from stockholders inquiring about the Mead proposal, Toomey circularized all stockholders in an endeavor to prevent the deposit and a sale to Mead (R. 427).

9. Certificates for 1971 shares (less than 51%) were deposited with the First National Bank of Tulsa between Aug. 2, 1937 and Oct. 27, 1937. All such stock was returned to depositors. None of the deposited stock was among the 2,000 shares purchased by Midco on September 3, 1937 (R. 427, 448).

10. Lahman, a broker in Tulsa, discussed with Toomey the acquisition of the stock in dispute (R. 428, 448). Lahman was requested by Engel of the bankrupt to sell the stock (R. 448).

11. Larsen of Hoagland & Allum discussed the proposed sale with Lahman. "His testimony did not have to do with the instability or insolvency of Hoagland & Allum." Larsen did not want Toomey to acquire the stock but was overruled by the management of Hoagland & Allum (R. 428).

12. The directors of Midco authorized the purchase (R. 428, 448).

13. The stock certificates eventually purchased by Midco were pledged by Engel with The Northern Trust Company of Chicago in support of his personal note for about

$50,000. Fourteen hundred shares so pledged and so sold were registered in Engel's name (R. 428, 448). "All of the pledged certificates were endorsed in blank by the registered holders with their respective signatures guaranteed by a brokerage house or bank" (R. 429, 448).

14. The sale was closed out through The Northern Trust Company, which transmitted the stock to Tulsa. The signatures of endorsement were each guaranteed by The Northern Trust Company. The stock was inspected and accepted by Toomey; the certificates cancelled, and a new certificate issued to Midco (R. 429, 448-9).

15. The price paid was a fair price and did not indicate any notice or knowledge of any infirmities (R. 429, 451).

16. Neither Toomey nor Midco nor any agent thereof had notice or knowledge that the stock which was purchased may have been held by Hoagland & Allum for any purpose other than sale in the regular course of business, or that the stock had been wrongfully converted (R. 429, 451).

17. There is no evidence in this case which indicates that Toomey or any agent of Midco had any notice or knowledge of any kind that there was any imperfection in connection with the manner in which this stock was held by The Northern Trust Company or being acquired by the Midco. There is nothing in the testimony which indicates Midco was not a purchaser for value, and there is nothing here which indicates it did not act in good faith (R. 429, 451).

The Circuit Court of Appeals "examined the record" and was "convinced there was substantial evidence upon which to base these findings" (R. 451).

At the bottom of page 20 of his brief, petitioner argues that the purchase was

a. "in a secret manner." The trial court was asked so to conclude. It refused (Refused Conclusion 4, R. 422).

b. "by the use of an intermediary (of) the issuing corporation." The trial court refused to find that Toomey directed Lahman. (Refused Finding 18, R. 418). The Circuit Court of Appeals found that it was Engel of Hoagland and Allum who requested Lahman to approach Toomey (R. 448).

c. "in violation of the statutes." Petitioner did not even ask the Court to make such finding (R. 414-426). It was not in issue.

d. "for the purpose of interfering with and nullifying" the Mead transaction. The Court refused so to find. (Submitted Finding 17, R. 417).

e. "at a substantially lower price." The Court found the price paid "was a fair price" (R. 429, 451). The price paid was $33.50 per share whereas the market value of the stock at the time of the purchase was from $29 to $32 a share (R. 266).

f. "not on the open market." The purchase was in the regular course of business. Hoagland and Allum was the house of issue of Midco stock (R. 140) and the recognized market for the stock (R. 145, 447-448). Lahman was informed by Hoagland and Allum that it was dealing in the stock all the time and always had 3,000, 4,000 or 5,000 shares on hand (R. 164-165).

The imputations, inferences and innuendos appearing throughout the petition and brief are as ill-founded on the record and the findings of both courts as those specifically refuted above in paragraphs (a) through (f).

SUMMARY OF ARGUMENT.

In answer to petitioner's four points of argument, respondent contends in similarly numbered points:

I.

The Circuit Court of Appeals did not refuse to take judicial notice of the statutes of Delaware and of Oklahoma relative to the purchase of its capital stock by an issuing corporation. The Court did take judicial notice of pertinent statutes called into issue by the pleadings and the evidence.

The statutes in question were not pertinent to the appeal.

II.

Whether the purchase of its own stock by the respondent was *ultra vires* is not in issue. The point was not and could not have been litigated under the pleadings.

It is a cardinal principle that an issue cannot be raised for the first time on an appeal.

Even if it be assumed that the stock purchase was *ultra vires,* the result would not be changed. The claim of *ultra vires* is not pertinent to overcome the defense of bona fide purchaser for value without notice. There is no causal relationship, as this Court has held in *Hubbard, assignee* v. *Tod,* 171 U. S. 474, 502, between an act in excess of power and notice of infirmities in title to securities.

III.

Corporate officers have trust obligations in respect to the property and business of the corporation but the trustee relationship does not extend to a stockholder in respect to his individual stock certificates, over which officers have no control. *Securities & Exchange Commission* v. *Chenery Corporation et al,* 318 U. S. 80.

The additional scrutiny, which petitioner thinks is demanded by a trust obligation which does not exist, would have made no change in the findings. The Circuit Court of Appeals examined the record with this supposed rule

in mind and stated that nonetheless it agreed with the findings which the trial court made (R. 449).

IV.

The respondent took good title to the stock either under the Uniform Stock Transfer Act of Illinois, the laws of Oklahoma, or the laws of Delaware.

V.

Additionally the respondent argues that the petitioner's action is barred by the statute of limitations.

The respondent's argument is directed to such of the issues raised by the petition and brief which the petitioner argues. Respondent does not reply to questions raised which the petitioner did not deem important enough to cover in his argument.

ARGUMENT.

I.

The Circuit Court of Appeals Did Not Refuse to Take Judicial Notice of the Statutes of Delaware and of Oklahoma. It Said the Statutes Were Not Pertinent to the Appeal.

The Circuit Court of Appeals in its opinion manifested no reluctance to accept the printed version of the statutes of Oklahoma or of Delaware without proof. Indeed, in its opinion (R. 450), that Court cited and quoted one Oklahoma statute. It also, on the same page, referred to the Uniform Stock Transfer Act.

The reason that the Court did not consider the sections of the Delaware and Oklahoma statutes which to petitioner seem pertinent was expressed by the Circuit Court of Appeals in part in the following language:

> "But no claim was made before the trial court, nor was the case tried upon the theory that the purchase of the stock was in violation of the statutes, and the point is raised for the first time on this appeal" (R. 449).

Additionally, the Court was not asked to consider the Delaware statute. It appears for the first time in the petition for the writ.

The Circuit Court of Appeals was voicing what this Court said in *Adams* v. *Saenger,* 303 U. S. 59, 63, cited by petitioner, viz., judicial notice would be taken of the laws of the several states,

> "where they are in issue".*

Petitioner does not complain that the District Court did not take judicial notice of the statutes for the obvious reason that petitioner did nothing by way of complaint, offer of evidence, or calling the statutes to the attention of that Court.

II.

Whether the Purchase of Stock was Ultra Vires is not In Issue.

Petitioner's Point II of Argument is fallacious on two grounds. *First,* the point has not been litigated, and could not have been litigated under the pleadings framed by petitioner. *Second,* it is assumed by petitioner that if the Court of Appeals had found that it was an issue and that the purchase was made without corporate authority, it necessarily must have reversed.

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*It is well settled that when anyone seeks the benefit of a statute or to enforce a statutory right or liability, he must by allegation and proof bring himself clearly within its provisions. *Touhey* v. *Decatur,* 175 Ind. 98, 102, 32 L. R. A. (N. S.) 350, 355.

IT IS A CARDINAL PRINCIPAL THAT AN ISSUE CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL

The reason for such a rule is obvious. To be fair to the opponent and the court, a litigant must "fairly acquaint the trial court with all matters relied upon". *Maloney* v. *Brandt,* 123 F. (2d) 779, 782, C.C.A. 7.

The supplemental complaint is barren of any fact allegation even remotely suggesting lack of authority to purchase or statutory violation in the purchase (R. 9).

The record of the evidence shows that the issue was not tried by the express or implied consent of the parties, as perhaps might have been done under Rule 15(b),—Rules of Civil Procedure.

The petitioner himself cannot believe the issue was tried for he submitted no findings or conclusions addressed to or collateral to such a point (R. 414, et. seq.).

The statement of points to be urged on appeal is equally silent (R. 432-4), though Rule 9 of the Circuit Court of Appeals of the Seventh Circuit requires that an appellant "shall set out separately and particularly each error asserted and intended to be urged".

The result of petitioner's point II is that the Circuit Court of Appeals is asserted to be erroneous because it did not reverse the trial court for failure to find something that the trial court was not asked even to find and for failure to determine an issue not before it.

Clearly, the petition for the writ should be denied under the doctrine of *McCullough* v. *Kammerer Corp. et al.,* 323 U. S. 327, in which this Court dismissed the writ of certiorari upon discovery that the question on which it was granted was neither raised, litigated, nor passed on below.

That courts do not determine issues attempted to be raised for the first time on appeal is ruled in the following decisions:

Denver Stock Yard Co. v. *U. S.,* 304 U. S. 470, 485

Becker Co. v. *Cummings,* 296 U. S. 74, 80

Denver v. *Denver Union Water Co.,* 246 U. S. 178, 185

Virtue v. *Creamery Package Mfg. Co.,* 227 U. S. 8, 38

EVEN IF IT BE ASSUMED THAT THE STOCK PURCHASE WAS ULTRA VIRES, THE RESULT WOULD NOT BE CHANGED.

There is no causal relationship between want of statutory authority and the question of good faith. The unfortunate loss by Hoagland & Allum customers was due to their misplaced confidence in placing their property, clothed with all the indicia of title, and dressed for "street" sale in the hands of unscrupulous men. *Ultra vires* would not create nor aggravate their loss; and *intra vires* would not relieve it.

The Supreme Court applied this rule in *Hubbard, Assignee,* v. *Tod,* 171 U. S. 474. In this case one Garretson, head of a railroad and bridge building syndicate, delivered his notes to Hubbard's assignor, Union Loan and Trust Company, upon the understanding that he, Garretson, would deliver to the trust company the collateral sought to be recovered in the suit from the defendant who claimed to be a *bona fide* purchaser for value (p. 475-6).

However, without any authority from Union Loan and Trust Company, Garretson caused the shares of stock and the bonds in question to be vested in Pacific Short Line Bridge Company and took back a note for $1,500,000 pledged by said stock and bonds (171 U. S. 477-478). Gar-

retson then transferred the said note and the shares of stock and bonds to the banking firm of J. Kennedy Tod & Co. of New York as collateral security for a loan to Garretson. Tod & Co. foreclosed the $1,500,000 note and bought in the collateral stock and bonds for $1,000,000 (171 U. S. 478). Hubbard, Assignee, then brought action against Tod & Co. praying for an injunction against the disposition of said stock and bonds and for a surrender by Tod to Hubbard of the collateral. Hubbard asserted that Tod & Co. was not a bona fide purchaser for value, in good faith, and without notice because the transaction by which Tod & Co. took the shares of stock as collateral security involved usurious rates of interest, and secondly, because the acquisition and pledging of the stock and bonds by Pacific Short Line Bridge Company was an *ultra vires* transaction.

This Court made several observations. The first agreed with the decision of the Circuit Court that Hubbard, in order to secure any relief in equity, would be compelled to pay the sums advanced and interest, refusing equitable relief because Hubbard had not tendered or made any offer of payment. This Court held that one who seeks the affirmative aid of equity can only do so by doing equity himself (171 U. S. 501, 502). The same observation may be made as to petitioner here, who has not offered to return the $67,000 which the Midco Oil Corporation in good faith paid for said 2,000 shares of its capital stock.

This Court next treated the defense that the transaction with the Bridge Company was *ultra vires,* and with respect to this contention, it held (p. 502):

> "**** there was nothing in the invalidity of the action of the Bridge Company which gave the Trust Company any greater right to the securities than it had before. **** the Trust Company could not avail itself, in favor of its own alleged claim, of such an infirmity, if it existed, nor could the holders of the

notes, which had passed into their hands as strangers, be deprived of the securities on the faith of which they had advanced their money; ****."

The Court next considered the analogous defense that the alleged usurious character of the contract, and its invalidity for lack of power in the Bridge Company, so took the transaction out of the ordinary course of business as to charge Tod & Co. and the loan holders with bad faith and notice of the alleged claims of the Trust Company (171 U. S. 502, 503). As to this contention the Supreme Court held:

> "**But we cannot perceive that the fact of usury between the parties to the contract, if usury there were, or action in excess of power, if that existed, either or both, can be laid hold of to justify the imputation of notice that Garretson was dealing with the securities in derogation of rights of the Trust Company.** Doubtless there are cases where commercial paper or securities may be offered for negotiation under circumstances so out of the usual course of business as to throw such grave suspicion on the source of title that lack of inquiry, assuming that it would disclose defects, might amount to culpable negligence. But that doctrine has no application here."

At p. 504, the Court continued:

> "If the transactions, thus briefly stated, were unaffected by notice of any want of authority in Garretson in respect of the Trust Company as now alleged, it is not for that company to say that Tod & Co., or the holders of the loan, should be held chargeable with notice simply because the commissions and options might have constituted usury as between the parties to the loan, or the Bridge Company, its stockholders, or judgment creditors might have had cause of complaint of defect of power."

By way of recapitulation as to Grounds I and II of the petitioner's argument, the respondent submits that there is no question which warrants the grant of the petition for the writ of certiorari. The question was not raised by the pleadings and was not litigated in the trial court; and even if it had been so litigated, a claim of *ultra vires* is not pertinent to overcome a defense that a purchaser of shares of capital stock is a bona fide purchaser for value without notice of infirmities in the title of such stock.

III.

Fiduciary Obligations of Corporate Officers in Respect to Corporate Property and Affairs Do Not Extend to Trust Duties In Respect to a Stockholder's Property, Over which the Corporation and Its Officers Have No Control.

As petitioner states his point III (Br. 19), Toomey and Midco owed a fiduciary obligation to the customers of Hoagland & Allum to protect them against the embezzlement of their stock by Hoagland & Allum, and its subsequent transfer to an innocent purchaser for value.

Even if such a rule as that proposed existed, it would have no application, in view of the concurring findings of the trial and appellate tribunals. The price was fair (R. 429, 451). There was no knowledge or notice of any infirmities (R. 429, 451). There was no knowledge or notice that Hoagland & Allum had the stock for any purpose other than sale in the regular course of business (R. 429, 451).

The Circuit Court of Appeals said (R. 449):

> "The argument is, that had the trial court been mindful of the rule, it would not have made the findings it did make. With this argument we cannot agree . . . ".

Here it is pertinent to observe that this Court in *United States* v. *Clark*, 200 U. S. 601, 608, applied the principle

that where both courts below concur on the question of bona fide purchaser their findings of fact will not be disturbed.

But the Circuit Court of Appeals correctly said there is no rule that a corporate officer has trust obligations in respect to the individual holdings of a stockholder, over which the officer has no control (R. 450). Petitioner voices no criticism of the cases relied upon by the Circuit Court of Appeals distinguishing between fiduciary obligations in respect to corporate property and business and the private personal stockholdings of shareholders, except to attempt a distinction in fact between the circumstances in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80 and the record in the instant case.

In the *Chenery* case, the fact finding tribunal found that "honesty, full disclosure, and purchase at a fair price" were present (p. 86). In the instant case the trial court found that "good faith was exercised and honesty of purpose was displayed" (R. 275) and that a "fair price" was paid for the stock (R. 429).

This Court held in the *Chenery* case, as the reviewing court held in the instant case that

> "*** the courts do not impose upon officers and directors of a corporation any fiduciary duty to its stockholders which precludes them, merely because they are officers and directors, from buying and selling the corporation's stock" (p. 88).

An examination of the three decisions* discussed by petitioner at pp. 21 and 22 of his brief discloses that none of them deals with acquisition of shares of stock, but instead involves property belonging to the corporation.

**Pepper* v. *Litton*, 308 U. S. 295.
Twin-Lick Oil Co. v. *Marbury*, 91 U. S. 587.
Southern Pacific Co. v. *Bogert*, 250 U. S. 483.

The law is clear that a director may deal with an individual stockholder and purchase his stock on practically the same terms as a stranger.

> *Hooker* v. *Midland Steel Company*, et al, 215 Ill. 444;
>
> *Bawden* v. *Taylor et al.*, 254 Ill. 464;
>
> *Capitol Hill Undertaking Co.* v. *Render*, 299 Pac. 854 (Okla. 1931).

The doctrine is applicable to Delaware corporations, as shown by *Dupont* v. *Dupont* (D.C. Del. 1917), 242 Fed. 98, 136, cited with approval in *Cahall* v. *Lofland* (Ct. of Chancery Del. 1921), 12 Del. Ch. 299, 305-306; 114 Atl. 224, 228, as follows:

> "(5) The duties of a director or other officer of a corporation in transactions where he is representing his company are governed by well-established and familiar rules of equity. A director of a corporation may freely purchase its stock, and occupies no relation of trust to an individual stockholder which prohibits his using whatever advantage his position may afford him through knowledge of its business and condition superior to that of the stockholder with whom he deals. He is not accountable to the stockholder for withholding information from him which affects the value of the stock, but to the corporation, the whole body of stockholders, he stands in a fiduciary relation which requires him to exercise the utmost good faith in managing the business affairs of the company with a view to promote, not his own interests, but the common interests, and he cannot directly or indirectly derive any personal benefit or advantage by reason of his position distinct from the co-shareholders." (p. 136)

It is in connection with the *Chenery* case that petitioner makes his unfounded observations as to secrecy, ulterior

purpose, inadequate price, etc. (Br. 20) which statements were considered seriatim herein, page 7.

Petitioner's point III does not justify the writ. The rule contended for does not exist; the *Chenery* case was correctly applied below; the additional scrutiny which petitioner thinks is demanded by a non-existent rule would have made no change in the findings (R. 449).

IV.

Respondent Took Good Title Under All Appilcable Authorities.

The petitioner's point IV is that the transfer may not be defended under the Illinois Uniform Stock Transfer Act because the States of Oklahoma and Delaware had not adopted the Uniform Transfer Act; but in support of his position, there are cited a Massachusetts case, a Minnesota case, and a New York case.

In consideration of this question, it should be observed that both the trial court and the Circuit Court of Appeals found that the stock certificates in question were endorsed in blank and were deposited by the certificate holders with Hoagland & Allum Co., Inc., and that the respondent purchased such certificates for value from Hoagland & Allum Co., Inc., in good faith and without any notice of any alleged infirmities in the title to such street certificates. Whatever may have been the law in Massachusetts, Minnesota, and New York, assuming that the petitioner has properly stated such law, there is no question that upon these fact findings that the transfer is valid.

It is valid under the law of Illinois, if the law of that state is applicable, because Illinois has adopted the Uniform Stock Transfer Act which petitioner concedes would pass good title to a bona fide purchaser for value and without notice.

It is valid under the laws of Oklahoma, if the laws of that state apply, and under the laws of Delaware (the state of incorporation), because Oklahoma treats stock certificates in street form in much the same manner as negotiable instruments and because Delaware applies the principle of estoppel against a certificate holder who endorses his stock certificates and gives them to another person.

The Oklahoma law is properly set forth in the opinion of the Circuit Court of Appeals (R. 450-451) as follows:

> "An Oklahoma Statute, 1941, Title 18, § 56 provides: '*** shares of stock are personal property, and may be transferred by endorsement by the signature of the proprietor, *** and delivery of the certificate; ***' In the case of *First National Bank* v. *Stribling* (Supreme Court of Oklahoma), 86 P. 512, 516, the court speaking of the language quoted, said: 'This language makes such shares of stock negotiable by endorsement and vests in the transferee a complete title to the paper transferred.' See also *Petty v. Knight-Petty Mercantile Co.,* 220 P. 835, 837. In the case of *Litchfield* v. *Henson Oil Co.,* 157 P. 137, 138 Oklahoma court) the court said: 'It is well known that stock certificates of all kinds have been construed in such a way that they have become the basis of commercial transactions in all the large cities in the country, and are sold in open market the same as other securities; and, whilst they are neither in the form or character of commercial paper, they approximate it as nearly as practicable.' See also *Capitol Hill Undertaking Co.* v. *Render,* 299 P. 854, and *Render* v. *Capitol Hill Undertaking Co.,* 53 P. 2d 251."

The Delaware law is to the same effect as appears from *E. I. DuPont de Nemours & Co.* v. *Laird et al* (Court of Chancery of Delaware, July 29, 1939, Decree Modified on other points on Reargument Nov. 11, 1939) 8 Atl. (2d) 162, 165-166:

> "The Uniform Stock Transfer Act has never been adopted in this State, so the determination of this

case is necessarily governed by equitable principles, and not by the provisions of that Act.

*** where the real owner of goods, chattels, or other personal property, by some act on his part, has given to another person the apparent indicia of title thereto, and, therefore, the apparent right to dispose of such property, a bona fide purchaser, or pledgee, for value from the person holding such evidence of title will be protected against the claim of the real owner.

*** where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected.

*** The delivery of stock certificates, endorsed in street form, usually comes within this rule, if they are sold or pledged to a bona fide purchaser for value, without notice of any defects in the title of the seller. This is not on the ground that such certificates are negotiable instruments, but on the ground of estoppel, based on the negligent or other acts of the real owner, which tend to mislead a bona fide purchaser or pledgee for value.

*** The recognition of these general principles is merely the application to particular facts of the well settled equitable rule that 'wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.' "

V.

No Useful Purpose Would Be Afforded By The Grant of The Writ of Certiorari Because The Petitioner's Action Is Barred by Statute of Limitations.

This action is plainly barred by the limitation of actions imposed by Section 11 (e) (11. U. S. C. 29) of the Bankruptcy Act. That the Trustee's action is specifically barred

by the time limits imposed by the Bankruptcy Act is, of itself, sufficient reason for denying the petition for certiorari. Both the trial court and the Circuit Court of Appeals found for the respondent on the merits. Either court could have found justifiably that the action was barred and dismissed it for that reason alone.

Paragraph 4 of the Answer (R. 31) pleads the bar of statute of limitations. The petitioner's supplemental complaint states that the cause of action is founded in Sections 60 (e) and 70 (e) of the Federal Bankruptcy Act (R. 9). The complaint alleges, and the petitioner conducted the trial and review on the theory, that the transfer of the stock in question to the respondent was fraudulent, to which subject matter Section 70 (e) (11. U. S. C. 110) pertains. However, it is Section 60 (e) (11. U. S. C. 96) upon which the petitioner must rely to support his action brought on behalf of customers of a bankrupt stock broker. It is Section 60 which generates the cause of action. The petitioner was therefore bound under the provisions of Section 11 (e) of the Bankruptcy Act to institute action within two years from the date of adjudication. It is the clear and unequivocal holding of the Court in *Herget* v. *Central National Bank & Trust Company of Peoria,* 324 U. S. 4 that Section 11 (e) is clearly appropriate to an action under Section 60 and that the time limitation is two years from the date of adjudication.

Hoagland and Allum was adjudicated bankrupt April 14, 1938 (R. 426), over seven months after the purchase. This action was instituted March 26, 1943 (R. 8) nearly five years after adjudication, and over five years after the purchase.

CONCLUSION.

The decisions and judgments complained of are correct. The case turned on fact issues resolved adversely to petitioner by concurring findings. The rules of law were correctly stated and correctly applied. New issues raised for the first time in a brief on appeal may not be heard, in fairness to the Court and opponent, who are entitled to know the metes and bounds of the litigation.

No reason of policy, interest, or justice suggests or requires the granting of the writ.

Respectfully submitted,

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